**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF VIRGINIA**
**ROANOKE DIVISION**

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| **JUANNITO H. EDWARDS #177045,** | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **Case No. 7:04-cv-00550** |
| | ) | |
| **D.A. BRAXTON, et al.,** | ) | **By: Michael F. Urbanski** |
| **Defendants.** | ) | **United States Magistrate Judge** |

## REPORT AND RECOMMENDATION

Plaintiff, Juannito H. Edwards, a Virginia inmate proceeding pro se, brings this action under the Civil Rights Act, 42 U.S.C. § 1983. The court's jurisdiction is pursuant to 28 U.S.C. § 1343. Plaintiff is currently incarcerated at Red Onion State Prison ("Red Onion"). Pursuant to new statewide rules regarding inmates held in segregation, officials at Red Onion restricted plaintiff's television-viewing privileges, confiscated his walkman, adapter, cassette tapes and prohibited him from purchasing tobacco, consumables and a cassette player at the commissary. Additionally, plaintiff claims officials have disparately treated segregated inmates, provided him with inadequate nutrition, used excessive force and provided unconstitutional conditions of confinement.

Plaintiff claims these restrictions and deprivations have violated his rights under the U.S. Constitution, particularly his rights under the First, Eighth and Fourteenth Amendments. This matter is before the court for report and recommendation on defendants' motion for summary judgment (Docket No. 18). Because the court finds that no violations have occurred, it is the recommendation of the undersigned that defendants' motion for summary judgment be granted.

**I**

Plaintiff's complaint contains five claims:

(A) that new regulations preventing segregation inmates from purchasing or possessing certain items of personal property, and limiting the types of programs that segregation inmates may watch on television violates his rights to equal protection and free speech;

(B) that receiving a penalty from a disciplinary hearing and then being continued on segregation status by the Classification Authority constitutes double jeopardy and denial of due process;

(C) that the diet and food portions at Red Onion are inadequate, and that their inadequacy has caused him to lose a great amount of weight;

(D) that he has been denied weekly physical assessments by the medical staff; and

(E) that on November 27, 2003, officers used unnecessary and excessive force against him when they used OC gas and placed him in ambulatory restraints.

**II**

Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56. Upon motion for summary judgment, the court must view the facts, and the inferences to be drawn from those facts, in the light most favorable to the party opposing the motion. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Rule 56(c) mandates entry of summary judgment against a party who "after adequate time for discovery and upon motion . . . fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

Celotex v. Catrett, 477 U.S. 317, 322 (1986). A genuine issue of material fact exists if a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

Ordinarily, a prisoner proceeding pro se in an action filed under § 1983 may rely on the detailed factual allegations in his verified pleadings in order to withstand a motion for summary judgment by the defendants that is supported by affidavits containing a conflicting version of the facts. Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979). Thus, a pro se plaintiff's failure to file an opposing affidavit is not always necessary to withstand summary judgment. While the court must construe factual allegations in the nonmoving party's favor and treat them as true, however, the court need not treat the complaint's legal conclusions at true. See, e.g., Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 217-18 (4th Cir. 1994); Custer v. Sweeney, 89 F.3d 1156, 1163 (4th Cir. 1996) (court need not accept plaintiff's "unwarranted deductions," "footless conclusions of law," or "sweeping legal conclusions cast in the form of factual allegations") (internal quotations and citations omitted).

**III**

**A**

Plaintiff's first claim involves new prison regulations that prohibit him from possessing a walkman and only allow him to watch certain educational and religious programs on his television. Because the court finds the decision as being of the sort prison officials, and not the courts, are to make under applicable case law, it is proper to grant defendants' motion for summary judgment regarding this claim.

The applicable standard of review is highly deferential to decisions made by prison

administrators. See Turner v. Safley, 482 U.S. 78, 89 (1987) (stating that in reviewing actions taken by prison officials, courts are to employ a deferential standard of review, ensuring that "prison administrators [are allowed] to make the difficult judgments concerning institutional operations."). They, and not the courts, are experienced in the care and management of those persons who have been incarcerated for their violations of criminal laws. In Ballance v. Young, 130 F. Supp. 2d 762, 768-69 (W.D. Va. 2000), the court employed a Turner analysis in evaluating a situation where some of a prisoner's belongings had been confiscated. The court determined the prison's confiscation of the prisoner's belongings satisfied Turner and was, "reasonably related to legitimate penological interest." Turner, 482 U.S. 89. There are four factors to be considered in determining the reasonableness of a prison regulation: (1) whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates and on the allocation of prison resources generally"; and (4) the "absence of ready alternatives", or, in other words, whether the rule at issue is an "'exaggerated response' to prison concerns." Id. at 89-90 (citations omitted).

All four Turner factors are easily satisfied. First, there is a valid and rational connection between the new statewide prison policy limiting segregation inmates' purchases and possession of certain personal property items and the legitimate governmental interests justifying that policy. Prisoners are incarcerated because they have demonstrated an unwillingness to abide by the rules of society. Thus, their incarceration is a punishment for that aberrant behavior. Further, those prisoners in segregation have demonstrated a propensity for violence against other inmates and/or an inability to

follow the rules to reside in prison. Segregation is not intended as punishment, but instead as a means to control inmates with chronic behavior problems who pose an increased threat to the security of the entire facility. (Defs.' Mot. Summ. J., Braxton Aff. ¶ 8.) As noted by the court in Hensley v. Verhagen, 2002 LEXIS 27143, at *4-5 (W.D. Wis. May 23, 2002), cassette players and tapes may pose a threat to the health and safety of inmates and guards when they are used by inmates inappropriately, when tapes encouraging violence against law enforcement are listened to or when they are used to hide contraband. Therefore, the newly implemented Virginia Department of Corrections' ("VDOC") regulations appear to be reasonably necessary to further ensure the protection and supervision of segregated inmates.

Regarding the second factor, the new regulations continue to allow segregation inmates to make limited reasonable purchases at the commissary for necessary items such as hygiene materials and legal materials. In addition, segregation inmates are afforded the opportunity to watch television for educational and religious purposes as they desire. (Defs.' Mot. Summ. J., Braxton Aff. ¶ 12(c), Attach. 3 at 1, "Memo To Inmate Population.") Segregation inmates were also provided reasonable notice of over one month before the new regulations were actually implemented to prepare for the removal of prohibited items.

Regarding the third factor, accommodating plaintiff's requests would not be feasible under the new policy that equitably limits all segregation inmates in all VDOC facilities from obtaining specific items.

Finally, the new commissary regulations are reasonable limitations on segregation inmates,

which are not unnecessarily overbroad, vague or restrictive.[1] As the new VDOC regulations satisfy the criteria in Turner, it is recommended that judgment be granted regarding plaintiff's first claim.

**B**

Plaintiff's second claim alleges that receiving a penalty from a disciplinary hearing and then being continued on segregation status constitutes double jeopardy and a denial of his due process rights. As no protected liberty interest is alleged, plaintiff was given appropriate written notice before the prison hearing, and double jeopardy does not apply to prison disciplinary proceedings, it is likewise recommended that defendants' motion for summary judgment be granted as to this claim.

In order to establish a claim for denial of procedural due process, a prisoner must, "allege first that he possessed a protected liberty interest, and was not afforded the requisite process before being deprived of that liberty interest." Cruz v. Gomez, 202 F.3d 593, 597 (2nd Cir. 2000). A two-part test is utilized to determine if a protected liberty interest exists. First, the prisoner must show the confinement at issue creates, "an atypical and significant hardship . . . in relation to the ordinary incidents of prison life." Cruz, 202 F.3d at 297 (quoting Sandin v. Conner, 515 U.S. 472, 484 (1995)). Second, the prisoner must show the state has granted inmates a protected liberty interest in

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[1] Plaintiff's claims that the new regulations violate his rights to equal protection are without merit as the new regulations apply to all segregation inmates at Red Onion and across the Virginia Department of Corrections facilities and have not been disparately enforced against the plaintiff. (Defs.' Mot. Summ. J., Braxton Aff. ¶ 11.) Similarly, plaintiff's claim that the new violations restricting the television programming he is allowed to watch violate his First Amendment rights to free speech are without merit as access to media is not considered "speech" as protected under the First Amendment. See Manley v. Fordice, 945 F. Supp. 132, 134 (S.D. Miss. 1996) (holding inmate's claim of violation of First Amendment Free Speech Clause without merit because Clause, "does not protect the public's right to media access.").

being free from that confinement by statute or regulation.

In this case, plaintiff has failed to sufficiently allege a violation of due process. Plaintiff fails to demonstrate that confinement in segregation in any way produces any significant hardship that is different in any way from any other status classification at Red Onion. Prison administrators are afforded great deference to best determine appropriate regulations concerning the operation of their facilities. Turner, 482 U.S. at 89. Plaintiff's claim that certain limitations are placed only on segregation status inmates and not on other inmates, does not rise to the level of a constitutional violation. Nor can plaintiff point to any regulation or statute that would grant the prisoner a protected liberty interest in being free from the newly implemented VDOC regulations.

Plaintiff alleges that he was denied due process also because he was not given appropriate notice or an opportunity to defend himself at the February 23, 2004 Institutional Classification Authority ("ICA") hearing. The Supreme Court provided that inmates facing disciplinary hearings are to be afforded (1) written notice of the charged violation; (2) disclosure of the evidence against them; (3) the right to confront and cross-examine witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (4) a neutral and detached hearing body; and (5) a written statement by the fact finders as to evidence relied on and reasons for any disciplinary action. Wolff v. McDonnell, 418 U.S. 539, 564 (1974); see also Segarra v. McDade, 706 F.2d 1301, 1304 (4th Cir. 1983).

Defendants submitted evidence of written prior notice of the classification hearing signed by plaintiff and dated four days prior to the actual hearing. (Defs.' Mot. Summ. J., Braxton Aff. ¶ 29, Attach. 4 at 4, "Institutional Classification Authority Hearing Form.") Defendants' same evidence also establishes that the remaining four Wolff criteria for a disciplinary hearing were met, and thus plaintiff's

claim is meritless. (Defs.' Mot. Summ. J., Braxton Aff. ¶ 29, Attach. 4 at 4, "Institutional Classification Authority Hearing Form.")

Plaintiff also asserts a double jeopardy claim alleging that he received both a penalty from a disciplinary hearing and was also continued on segregation status by an ICA hearing. However, the Supreme Court held in Wolff v. McDonnell, that "prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." Wolff, 418 U.S. at 556. Thus, the double jeopardy claim does not apply to prison classification or disciplinary hearings. See Breed v. Jones, 421 U.S. 519, 528 (1975) ("In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution.").

Similarly, in Cruz v. Gomez, 202 F.3d 593, 596 (2nd Cir. 2000), an inmate was found guilty by a disciplinary hearing while in administrative segregation. Much like plaintiff in the present case, plaintiff in Cruz alleged a violation of double jeopardy because he was not afforded due process. The Second Circuit held that plaintiff inmate did not have a double jeopardy constitutional claim, "because jeopardy does not attach at prison disciplinary or classification hearings." Id. Likewise, plaintiff's claim of double jeopardy should fail because the ICA hearing in this case is a prison disciplinary decision that falls outside the parameters of double jeopardy protection. Thus plaintiff's double jeopardy claim is inapplicable and without merit.

**C**

Plaintiff also claims he has been denied adequate nutrition and as a result has lost a great amount of weight. In order to establish an Eighth Amendment violation for cruel and unusual punishment, plaintiff must show the deprivation alleged was made by defendants with deliberate

indifference to the needs of the plaintiff. Wilson v. Seiter, 501 U.S. 294, 297 (1991). Plaintiff has failed to adequately show any nutritional deprivation by defendant or that defendants' nutritional provisions at Red Onion constitute a deliberate indifference to plaintiff's needs. As such, it is clear that defendants' motion for summary judgment regarding this claim should be granted.

Plaintiff alleges he has lost fifty-three pounds and suffers from fatigue and hunger pains as a result of inadequate nutrition provided to him at Red Onion. (Compl. at 25.) However, defendants' affadavits from the Nursing Director at Red Onion as well as supporting medical charts show plaintiff has lost approximately twenty-four pounds between October 11, 2002 and March 4, 2004. Defendants also provide evidence that plaintiff refused forty-four consecutive meals offered to him as part of a hunger strike, and was subsequently examined by medical personnel at Red Onion during his hunger strike. (Defs.' Mot. Summ. J., Phipps Aff. ¶ 7-11, Attach. 16 at 7-8.) Defendants' exhibits also show that despite his weight loss, plaintiff's weight remains well within the normal range for his height, thus posing no imminent threat to his health. (Defs.' Mot. Summ. J., Phipps Aff. ¶ 4, Attach. 16 at 7-8.)

In addition, plaintiff claims that the three daily meals and two weekend meals provided are inadequate to meet his nutritional needs. The Fourth Circuit held in White v. Gregory, 1 F.3d 267, 269 that, "a prisoner must suffer 'serious or significant physical or mental injury' in order to be 'subjected to cruel and unusual punishment within the meaning of the' Eighth Amendment." (quoting Strickler v. Waters, 989 F.2d 1375, 1381 (4th Cir. 1993)). The affidavit of D. McKnight, Food Operations Director at Red Onion refutes plaintiff's claim and establishes that the meals provided inmates comports with VDOC standards and the Food Guide Pyramid requirements, inclusive of portions. Additionally,

all inmates are served the same meals regardless of their segregation status. (Defs.' Mot. Summ. J., McKnight Aff. ¶ 4-6.)

Plaintiff has provided no evidence to the contrary. As the Fourth Circuit held in Abcor Corp. v. AM Int'l, 916 F.2d 924, 929 (4th Cir. 1990), "mere assertions by the plaintiff are not enough to survive summary judgment." Further, the Supreme Court held in Anderson, plaintiff must provide significant probative and not merely colorable evidence to rebut the movant's evidence. Anderson, 477 U.S. at 249, 250. At best, plaintiff offers mere assertions and certainly no significant probative evidence. Therefore, with the evidence provided regarding the consistency of meals provided to all inmates at Red Onion as well as with the documented evidence of plaintiff's voluntary refusal to eat meals offered to him for eighteen consecutive days, defendants' motion for summary judgment on this claim should be granted.

Indeed, given plaintiff's hunger strike, his claim that he lost weight due to the prison diet is both absurd and patently frivolous. As such, it should be dismissed.

**D**

Plaintiff's fourth claim is that he was denied weekly physical assessments by medical staff, in violation of his Eight Amendment right to be free from cruel and unusual punishment. Because plaintiff's claim on this matter is without merit, defendant's motion for summary judgment should be granted.

Again, in order to establish an Eighth Amendment violation for cruel and unusual punishment, plaintiff must show the deprivation alleged was made by defendants with deliberate indifference to the needs of the plaintiff. Wilson v. Seiter, 501 U.S. 294, 297 (1991). With regards to the provision of medical care and treatment to prisoners only the, "deliberate indifference to the serious medical needs

of prisoners constitutes the 'unnecessary and wanton infliction of pain.'" Estelle v. Gamble, 249 U.S. 97, 104 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)). Plaintiff alleges no evidence of any physical or mental condition that would warrant the weekly physical assessments he seeks, nor that such assessments were deliberately denied without regard for his health and well being. Nor does plaintiff allege any actual injury that has resulted from a lack of said weekly physical assessments. As such, plaintiff has not made a showing of any "serious medical need" to which the defendant was indifferent.

Further, the medical records provided by defendants tend to show frequent medical assessments by appropriate medical personnel for various complaints and ailments. (Defs.' Mot. Summ. J., Phipps Aff. ¶ 4-8, 11-12, Attach. 16 at 5-12.) As such, plaintiff can make no showing of deliberate indifference. Because plaintiff fails to show any need or deleterious effect from not receiving weekly medical assessments, defendants' motion for summary judgment on this claim should be granted.

**E**

Plaintiff's fifth and final claim is that defendants used excessive and unnecessary force in restraining and removing him from his cell on November 27, 2003, resulting in physical injuries. Because plaintiff provides no evidence to support his allegations, defendants' motion for summary judgment on this issue should be granted. Plaintiff may not rely on mere "assertions in his pleadings to avoid summary judgment; he must come forward with evidence." Ware v. Potter, 106 Fed. Appx. 829, 833 (4th Cir. 2004). See also Evans v. Techs. Applications & Serv. Co., 80 F.3d 954, 960 (4th Cir. 1996) (holding plaintiff's "unsubstantiated allegations and bald assertions" insufficient to avoid

summary judgment).

As the Supreme Court held in Whitley v. Albers, 475 U.S. 312, 320-321 (1986),

> Where a prison security measure is undertaken to resolve a disturbance, such as occurred in this case, that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

(quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2nd 1973)). Evidence provided by defendants including affidavits from prison guards involved in the November 27, 2003 incident, medical personnel and a security tape of the incident demonstrate that the force and restraint used to extract plaintiff was necessary and applied in good faith.

The security tape of the November 27, 2003 incident first showed plaintiff in his cell covering his mouth and body with a blanket, presumably to avoid the noxious fumes of the pepper spray in his cell. Prison security guards ordered plaintiff to turn around and back up to the cell door for restraints seven times. Plaintiff remained standing and refused to approach the door. Prison security guards then opened the cell door and restrained plaintiff in handcuffs and leg shackles. Plaintiff was escorted to a shower where he washed off the pepper spray and responded to the security guards that he was okay. The guards then escorted plaintiff to a cell where he was placed in ambulatory restraints and a nurse was called to evaluate his condition. During the entire incident, defendants did not rub water in plaintiff's face as he alleges, nor was there any evidence of excessive force. To the contrary, defendants' actions towards plaintiff were very reasonable during the incident. (Defs.' Mot. Summ. J.,

Attach. to Ex. VII, Video Cassette.)

Plaintiff has failed to show that the procedures utilized by defendants including pepper spray, shower or ambulatory restraints were unreasonable or unnecessary. In fact, the evidence presented by defendants demonstrates plaintiff's behavior in his cell was erratic and unruly and it was his failure to comply with orders that resulted in an extraction team being summoned. (Defs.' Mot. Summ. J., Day Aff. ¶ 4.) Review of the video shows no excessive force was used.

Plaintiff alleges he suffered injuries as a result of the November 23, 2003 incident. Plaintiff alleges he suffered from bruises on his neck, elbows, ribs and wrists and cuts on his right knee and left ankle as a result of being aggressively removed from his cell. Plaintiff also alleges he suffered pain from the pepper spray and ensuing shower. (Compl. at 28.) However, medical records presented by defendants show only a small cut on plaintiff's left ankle and no other documented complaints or injuries. (Defs.' Mot. Summ. J., Phipps Aff. ¶ 12, Attach. 16 at 10.) Plaintiff has failed to respond to these allegations.

Plaintiff's documented injuries are thus insufficient to constitute a claim as they fall into the de minimis exception to § 1983. When injuries are de minimis, excessive force claims fail except in extraordinary circumstances. Norman v. Taylor, 25 F.3d 1259, 1263 (4th Cir. 1994). Mere swelling, tenderness, bruising, and mild abrasions are considered de minimis in this circuit. See, e.g., Taylor v. McDuffie, 155 F.3d 479, 484 (4th Cir. 1998) (finding swelling in the jaw, abrasions to wrists and ankles, and tenderness over some ribs to be de minimis). In this case, plaintiff's alleged injuries are at most de minimis. Plaintiff alleges only minor abrasions and bruising (Compl. at 28), yet the evidence

presented by defendants supports the conclusion that any actual injuries that may have resulted were at most de minimis. Thus, because the video shows no excessive force and plaintiff's injuries were at most de minimis, plaintiff's claim of unnecessary and excessive force must also fail.

Therefore, it is the recommendation of the undersigned that defendants' Motion for Summary Judgment (Docket No. 18) be GRANTED.

**VI**

The Clerk of the Court is directed immediately to transmit the record in this case to the Honorable Samuel G. Wilson, United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note any objections to this Report and Recommendation within ten (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to filed specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection.

The Clerk of the Court is hereby directed to send a certified copy of this Report and Recommendation to plaintiff and counsel of record.

**ENTER:** This 10th day of June, 2005.

/s/ Michael F. Urbanski